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No. 09-849

IN THE

Supreme Court of the United States

THE SHIPPING CORPORATION OF INDIA, LTD.,
Petitioner,

—v.—

JALDHI OVERSEAS PTE LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

The Maritime Law Association of the United States (hereinafter "MLA") respectfully seeks leave to file an *amicus curiae* brief in support of the petition of The Shipping Corporation of India, Ltd. for a writ of certiorari pursuant to Rule 37.2(b) of the RULES OF THE SUPREME COURT OF THE UNITED STATES.[1]

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[1]. Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nation-wide bar association founded in 1899, with a membership of approximately 3,100 attorneys, judges, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests—shipowners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.[2] This

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part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Pursuant to this Court's Rule 37.2(a), *amicus curiae* states that petitioner and respondent received timely notice of the intent to file this brief. Petitioner consented to the filing, but respondent withheld consent.

The MLA takes no position on whether or not electronic fund transfers with the defendant as either the originator or the beneficiary should be subject to attachment under Rule B but rather seeks a uniform rule governed by federal rather than state law.

2. The MLA has sponsored a wide range of maritime legislation and revisions thereto in its 110 years of existence, including the Carriage of Goods by Sea Act, 46 U.S.C. §§ 30701-30707; the maritime portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611; the Maritime Lien Acts of 1910 and 1920 and their 1988 amendments, *see* 46 U.S.C. §§ 31341-31343; the Act permitting appeals from interlocutory admiralty decrees, 28 U.S.C. § 1292(a)(3); the Public Vessels Act, 46 U.S.C. §§ 31101-31113; the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 30101; and the Inland Rules Act, 33 U.S.C. §§ 2001-2038. *See also Merchants Bank of Mobile v. Dredge GENERAL G.L. GILLESPIE*, 663 F.2d 1338, 1350, n.17 (5th Cir. 1991) ("*Merchants Bank*") (MLA "regularly participates in national and international proceedings concerning maritime treaties and

Court has described the MLA as "an organization of experts in admiralty law" and "an expert body of maritime lawyers . . . ."[3]

The purposes of the MLA[4] are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

It is the MLA's policy to involve itself as *amicus curiae* only when important issues of maritime law or practice are implicated and only when the effect of

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conventions").

3. *Offshore Logistics* v. *Tallentire*, 477 U.S. 207, 223-24 (1986) ("*Offshore Logistics*").

4. Admiralty courts have recognized the MLA's general interests and concerns, including the "growing risk that fundamental principles of maritime law are presently being inadvertently eroded." *Merchants Bank*, 663 F.2d at 1349, n.17.

the Court's decision on maritime commerce or admiralty law may be substantial.[5] The MLA is interested in this case because:

(1) the decision at issue affects a specific procedure that is characteristic of maritime law, and has been used in some form in maritime cases throughout legal history;

(2) prejudgment attachment pursuant to Rule B of the SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE ("Supplemental Admiralty Rules") is often the sole means of obtaining jurisdiction over maritime defendants, so the decision significantly affects the scope of admiralty jurisdiction;

(3) the use of State law to interpret a federal procedural rule violates the Constitution's allocation of admiralty law to federal rather than State power and the uniformity doctrine that this allocation was designed to effect;

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5. *E.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. __, 128 S. Ct. 2605, 76 U.S.L.W. 4603 (2008) ("*EXXON VALDEZ*"); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 487 U.S. 358 (1990); *Offshore Logistics*, 477 U.S. 207; *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

(4) as the organization that comprises the practitioners who are the primary users of the Supplemental Admiralty Rules, the MLA actively participated in the 1966 merger of the former General Admiralty Rules of the Supreme Court and the Federal Rules of Civil Procedure and has a strong interest in promoting the uniform application of the Supplemental Admiralty Rules in a manner consistent with their intent and purposes; and

(5) in accordance with MLA's objective of facilitating justice in the administration of maritime law, the MLA is concerned with maintaining procedural fairness in the national courts that formulate and apply the laws affecting maritime commerce.

The MLA's nationwide membership and members of the maritime community therefore have a special interest in this Court issuing a writ of certiorari and can provide an impartial view of the importance of this case to maritime practice.

SUMMARY OF ARGUMENT

The Constitution allocates substantive and procedural admiralty law to federal, not state, control. Accordingly, as a matter of federal competence, and because of the need for national uniformity that led to that allocation of competence, characteristic features of maritime law such as maritime attachment should not be subject to the vagaries of State law. The type of property within

the reach of Rule B should instead be defined by a uniformly applicable federal standard. If the existing law interpreting Rule B does not already provide that standard, it is incumbent on the federal courts to formulate one.

Resolving the question at issue is a matter of tremendous importance. New York is one of the world's principal maritime centers and nearly every international transaction using US dollars as the currency of payment will at some point pass through New York as an electronic funds transfer (EFT). All merchants and shipping interests involved in international commerce require a single, unassailable rule from this Court in order to have a reliable legal framework on which they can structure their contracts, financing, and other corporate transactions, down to where they register to do business. The issue on which certiorari is sought—whether or not EFTs of any kind are subject to attachment at any point in the transfer process—is therefore an issue of federal law with profound and far-reaching consequences that should be settled by this Court.

The Second Circuit sharply departed from the requirements of due process by (1) deciding issues that were not raised in or by the District Court or briefed by the parties on appeal; (2) founding its decision on factual allegations by *amici* and commentators that were neither supported by a record nor subject to challenge by the parties; and (3) without notifying the parties, overruling *sua sponte* and *en banc* its own precedent dealing with a significant and complex point of law that neither

party was given an opportunity to brief. While it is not the business of this Court to correct every erroneous decision, it is nevertheless this Court's role to exercise its supervisory powers to amend the Second Circuit's departure from the usual course of judicial proceedings.

ARGUMENT

I. THE INTERPRETATION AND SCOPE OF A FEDERAL PROCEDURAL RULE CHARACTERISTIC OF ADMIRALTY LAW MUST BE THE SUBJECT OF A UNIFORM FEDERAL RULE AND CANNOT BE SUBORDINATED TO STATE LAW.

A. Maritime Attachment is a Characteristic Feature of Maritime Law.

In a landmark decision issued in 2003, the Second Circuit held:

> Maritime attachment is centuries old. "The use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty . . . has prevailed during a period extending as far back as the authentic history of those tribunals can be traced." *Atkins v. Fibre Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 303 (1873). As early as 1825, the Supreme Court was able to say of the right of attachment in *in personam* admiralty cases that "[t]his Court has entertained such suits too often, without hesitation, to permit the right now to be questioned." *Manro v. Almeida*, 23 U.S. (10

> Wheat.) 473, 486 (1825). "***[M]aritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844.***" *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996).

Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 267-68 (2d Cir. 2003) (parallel citations omitted) (emphasis added).

Attachment is therefore one of the characteristic features of maritime procedure, which is embodied in a special group of rules founded on traditional practice. *See* Supplemental Rule A advisory committee notes, 1966 adoption. Such rules remain of great importance in facilitating maritime commerce by providing a means of enforcing the obligations of distant debtors.

B. The Constitution Commands that Maritime Matters Be Governed by a Uniform Body of National Law, Not a Patchwork of State Laws.

It was improper to use State law to control the interpretation and scope of a characteristic admiralty procedure such as maritime attachment. *See* U.S. CONST. art. III, § 1, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 3.

> [The Constitution] took from the States all power, by legislation or judicial decision, to

> contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920).

This Court has consistently confirmed that the Framers intended "to place the entire subject [of maritime law]—its substantive as well as its procedural features—under national control." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924); *accord Norfolk Southern v. Kirby*, 543 U.S. 14, 23, 28 (2004)[6]; *see* EXXON VALDEZ, 128 S. Ct. at 2630 n.21. Thus, "in several contexts, [this Court has] recognized that vindication of maritime policies demand[s] uniform adherence to a federal rule of decision . . . ." *Kirby*, 543 U.S. at 28.

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6. *See Kirby*, 543 U.S. at 23 ("Article III's grant of admiralty jurisdiction must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.") (citations and internal quotation marks omitted).

Application of state law—even when most states have adopted some version of a model law like the UCC—is offensive to the Constitution not only as a matter of principle, but also would inevitably impair the uniformity required in maritime cases as a practical matter. As the MLA stated in its *amicus* brief to the Second Circuit in a Rule B case overruled by the decision at issue,

> Even if all fifty states adopted identical versions of UCC Article 4A (which has not happened), application of state law would still disrupt the necessary uniformity in the availability of maritime attachments. *See generally* Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 442, 452-53, 456-57, 459-60, nn.72, 134, 139 & 142 (1994) (discussing the deliberate choice made to enact a fifty-state statute rather than a federal statute so that, if desired, states could depart from the standard); *see also* Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COMM. 553, 567 (1995) (discussing how apparent uniformity–adoption of the same text–quickly degenerates into inconsistency).[7]

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7. Brief of *Amicus Curiae* The Maritime Law Association of the United States in Support of Application of Federal Maritime Law dated October 5, 2007 at 8-9, 12-13, filed in Consub Delaware LLC v. Schahin Engenharia Limitada, Docket

Whether or not it was error for the Second Circuit to hold that electronic funds transfers were not subject to attachment, the application of state law to reach this result impermissibly erodes the uniformity necessary to conduct maritime and international commerce and defies the constitutional provisions recognizing that necessity by placing control of admiralty under national authority.

C. In the Absence of a Federal Rule Determining If and When EFTs Are Subject to Maritime Attachment, the Federal Courts Have a Duty to Fashion One.

Because neither this Court nor Congress has had occasion to establish a rule concerning maritime attachment of EFTs, it was incumbent upon the Second Circuit, as a federal court sitting in admiralty, to create a national rule rather than to defer to state law.

In a case of great general interest, this Court recently confirmed the U.S. courts' "federal maritime common law authority" in admiralty cases to craft and "regulate a common law remedy for which *responsibility lies with this Court as a source of judge-made law in the absence of statute.*" *EXXON VALDEZ*, 128 S. Ct. at 2626-27 (emphasis added); *see id.* at 2630 n.21; *see also Kirby*, 543 U.S. at 23, 28.

Number 07-0833-cv (2d Cir.) (citations and parenthesis omitted). *See Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008), *overruled by The Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 2009 U.S. App. LEXIS 22747, 2009 AMC 2409 (2d Cir. 2009).

The duty of federal courts to fashion a maritime rule where none exists arises from the character of maritime law as "a mixture of statutes and judicial standards, an amalgam of traditional common-law rules, modifications of those rules, and newly created rules . . . . The Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law' . . . ." *Id.* Instead of resorting to state law when a case poses a novel question, "past precedent argues for . . . setting a judicially derived standard, subject of course to congressional revision." *Id.*[8]

To be sure, in announcing a new rule, a federal court may consult other bodies of law—precedents, statutes, and rules of the States and other nations, as well as conventions and other international laws—to develop its own standard; but here, the Second Circuit instead substituted state law for federal law, ruling explicitly that "Because EFTs in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary *under New York law*, they cannot be subject to attachment under Rule B." *Jaldhi*, 585 F.3d at **35 (emphasis added).

That statement directly contradicts both the outcome and reasoning of *Winter Storm* and *Consub*, the Second Circuit cases overruled by *Jaldhi*. In *Winter Storm*, the Second Circuit held that because

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[8]. *Id.*, slip op. at 35-36 n.21 (emphasis added; internal quotation marks omitted).

Rule B embodied a characteristic feature of admiralty, state statutes were preempted by a judge-made federal rule. 310 F.3d at 279. The *Consub* court observed that there was "no justification for departing from the principle of *stare decisis* here where Schahin has not shown that *Winter Storm* is unworkable, and where admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the *Winter Storm* rule." 543 F.3d at 109.

Even if there had been a sea change in the single year between *Consub* and *Jaldhi* that would justify a difference in their outcome, that novel result should have been reached by developing and announcing a new federal admiralty standard defining the scope of Rule B, not by abdicating a federal court's rule-making responsibility and deferring to state law.

II. This Court Should Grant the Petition Because the Second Circuit Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.

Because EFTs typically pass through New York, no other Circuit will have occasion to rule on the question posed here. Nevertheless, this matter demands the attention of this Court because of the importance of the question presented.

New York is a great center of maritime and commercial activity, and anything that affects the functioning of maritime law in New York will

produce results in the international commercial community. Here, the results are of major magnitude. Those contemplating transactions need to know what resources are or are not available if the deal goes awry in order to decide what kind of security might be required beforehand. Maritime claimants need to know what funds might be available to satisfy an award or judgment in order to decide whether or not to proceed. Locations of corporate offices and designation of agents for service of process are also affected.

In order to flow smoothly, international commerce and shipping demand a consistent and reliable legal framework, including a final resolution of the type of property that can be attached under Rule B. This Court should settle this important question of federal law.

III. This Court Should Exercise its Supervisory Power to Ensure that Due Process Standards Commensurate with the Circumstances Were Observed.

Because *Winter Storm* and *Consub* expressly permitted attachment of EFTs originated by maritime defendants, the *Jaldhi* defendant moved to vacate the attachment only of EFTs of which the defendant was the beneficiary. The district court's ruling was therefore restricted to the narrow issue of whether or not such EFTs were subject to attachment, and the question on appeal was restricted the district court's resolution of that single circumscribed question. *See Shipping Corp. of India,*

Ltd. v. Jaldhi Overseas PTE Ltd., No. 08 Civ. 4328, 2008 U.S. Dist. LEXIS 49209 (S.D.N.Y. June 27, 2008), *vacated and remanded*, 585 F.3d 58, 2009 U.S. App. LEXIS 22747, 2009 AMC 2409 (2d Cir. 2009).

Despite the fineness of the point presented on appeal,[9] the Second Circuit issued a sweeping decision and, without inviting briefing by the parties or giving them any indication of the intended scope of the impending decision, took the exceptional step of overruling a precedent on which the members of the maritime community had based their conduct, expectations, and contractual arrangements.

Moreover, again without notifying the parties and despite the constraints on overturning established precedents noted by the *Consub* panel,[10]

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9. *Jaldhi*, 585 F.3d at *66-*67 ("the question presented squarely in this appeal—whether an EFT is defendant's property when defendant is the ***beneficiary*** of that EFT") (emphasis added).

10. The *Consub* panel stated:

> [I]t is well established in this Circuit that 'one panel of this Court cannot overrule a prior decision of another panel, unless there has been an intervening Supreme Court decision that casts doubt on [this Court's] controlling precedent,' or unless an en banc panel of this Court overrules the prior decision. There has been no intervening Supreme Court case, and no decision by an en banc panel overruling *Winter Storm*."

Consub, 543 F.3d at __. This Court did not issue any opinions on Rule B between the decisions in *Consub* and *Jaldhi*.

the panel sought and the active Circuit judges agreed to issue the *Jaldhi* decision through a "mini en banc" procedure. A question that the Panel thought merited deliberation by the entire Circuit should surely be decided with the benefit of the parties' arguments, particularly in view of the impregnability within the Circuit of a decision with en banc effect.

Although the *Consub* court stated that it had not been shown that *Winter Storm* was "unworkable," 543 F.3d at 109, the *Jaldhi* court relied on its perception that *Winter Storm* had the "untenable consequences" alleged by an *amicus* and commentator, specifically: "disrupt[ing] th[e] balance [of the banking system] and threaten[ing] the efficiency of funds transfer systems, perhaps including Fedwire"; and "discourag[ing] dollar-denominated transactions and damag[ing] New York's standing as an international financial center." *Jaldhi*, 585 F.3d at *62. In deciding a case with such far-reaching consequences, the court should have given the parties an opportunity to test the accuracy of these perceptions.

Especially in view of the worldwide attention focused on this case, this Court should exercise its supervisory power to ensure that the process by which a conclusion is reached will withstand the strictest scrutiny.

CONCLUSION

The MLA respectfully requests that the Court grant certiorari and resolve the questions presented by petitioner The Shipping Corporation of India Ltd.

	Respectfully submitted,
WARREN J. MARWEDEL MARWEDEL MINICHELLO & REEB PC 10 South Riverside Plaza Suite 720 Chicago, Illinois 60606 (312) 902-1600 *President,* *The Maritime Law* *Association* *of the United States*	LIZABETH L. BURRELL *Counsel of Record* CURTIS, MALLET-PREVOST, COLT & MOSLE LLP 101 Park Avenue New York, NY 10178- 0061 (212) 696-6995 *Attorneys for MLA in* *Support of Petitioner*